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No. 03-407

In the Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A. CRANE,
and JUDGE LYNDA L. HEATHSCOTT,
Petitioners,

JUDGE DENNIS C. KOLENDA,
Respondent,

v.

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND MICHAEL D. VOGLER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID MORAN
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. PALMER STREET
DETROIT, MI 48202
(313) 577-4829

MARK GRANZOTTO
Counsel of Record
414 WEST FIFTH STREET
ROYAL OAK, MI 48067
(248) 546-4649

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

I. DOES THE FOURTEENTH AMENDMENT GUARANTEE AN INDIGENT CRIMINAL DEFENDANT THE ASSISTANCE OF APPELLATE COUNSEL FOR A FIRST-TIER APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN COURT OF APPEALS FROM A PLEA-BASED FELONY CONVICTION, WHERE THE MICHIGAN COURT OF APPEALS GRANTS OR DENIES APPLICATIONS FOR LEAVE TO APPEAL ON THE MERITS?

II. DO RESPONDENT ATTORNEYS HAVE STANDING UNDER THE DOCTRINE OF *JUS TERTII*?

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COUNTERSTATEMENT OF THE CASE

Since 1994, the Michigan Constitution has required a criminal defendant who wishes to appeal his or her conviction and sentence after a plea of guilty or nolo contendere to file an application for leave to appeal to the Michigan Court of Appeals. Mich. Const. 1963, Art. 1, § 20. The Michigan Court of Appeals' decision to grant or deny a properly-filed application depends solely on whether the issues presented are meritorious, and the court's orders "denying leave uniformly state that leave is denied 'for lack of merit in the grounds presented.'" *People v. Bulger,* 614 N.W.2d 103, 124 (Mich. 2000) (Cavanagh, J., dissenting); *see also* (R.2: Motion for Preliminary Injunction, Exhibit B) (examples of Michigan Court of Appeals form orders denying leave to appeal to indigents "for lack of merit in the grounds presented").

After the 1994 amendment to the Michigan constitution that required criminal defendants to file applications for leave to appeal to the Michigan Court of Appeals from plea-based convictions, the vast majority of Michigan judges continued to appoint appellate counsel to assist indigents who wished to pursue appellate relief from their plea-based convictions and sentences. In 1999, however, the Michigan Legislature enacted Mich. Comp. Laws § 770.3a (2000) ("the statute"), which provides that Michigan judges "shall not" appoint appellate counsel to assist indigent defendants who wish to file an application for leave to appeal to the Michigan Court of Appeals from a plea-based conviction or sentence unless the indigent received an upward departure from the sentencing guidelines or was permitted to enter a conditional plea. A trial judge "may" appoint appellate counsel for an indigent defendant if he or she has preserved an outcome-determinative challenge to the judge's scoring of the sentencing guidelines, but the judge is under no obligation to do so. For all other

types of issues an indigent may raise on appeal, such as the voluntariness of the plea, the adequacy of the factual basis, whether consecutive or concurrent sentencing should have been imposed, or whether the conviction violates double jeopardy, the statute flatly prohibits the appointment of appellate counsel to assist an indigent who wishes to file an application for leave to appeal, no matter how meritorious those issues may be.

The statute has never taken effect because of the instant litigation. The plaintiffs, including several indigent criminal defendants who were denied appellate counsel by defendant state court judges even before the statute took effect and several appellate attorneys who would receive far fewer appointments to represent indigent criminal defendants on appeal if the statute were to take effect, argued that the statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment by denying indigents, and only indigents, the assistance of counsel necessary to obtain meaningful appellate review of their convictions and sentences. The district court agreed and therefore declared that the statute violates the Fourteenth Amendment. *Tesmer v. Granholm*, 114 F. Supp.2d 603 (E.D. Mich. 2000) (87a-124a).

Petitioners appealed that decision to the United States Court of Appeals for the Sixth Circuit, arguing both that there is no constitutional right to counsel for the state appeal at issue and that the attorney-plaintiffs lack standing to assert the constitutional rights of their future clients. A panel of the Sixth Circuit agreed with the district court that the attorney-plaintiffs have *jus tertii* standing but reversed the district court's conclusion that the statute is unconstitutional. *Tesmer v. Granholm*, 295 F.3d 536 (6th Cir. 2002) (63a-84a). On rehearing *en banc*, the Sixth Circuit agreed with the district

court and the original panel that the attorney-plaintiffs have *jus tertii* standing. *Tesmer v. Granholm*, 333 F.3d 683, 691-696 (6th Cir. 2003) (*en banc*) (10a-19a). The *en banc* court then affirmed the district court's conclusion that the statute is unconstitutional. *Id.*, 333 F.3d at 696-701 (19a-29a).

ARGUMENT

I. The Sixth Circuit and the district court properly concluded that the denial of appointed counsel to indigent defendants filing their first direct appeals after pleading guilty or nolo contendere violates the Fourteenth Amendment.

There is no compelling reason for this Court to exercise its jurisdiction in this case. The only authority contrary to the conclusion reached by the Sixth Circuit is the Michigan Supreme Court's decision in *People v. Bulger*, 614 N.W.2d 103 (Mich. 2000), upholding Michigan's attempt to deny counsel to indigents seeking direct appellate review of their plea-based felony convictions. Since the Sixth Circuit squarely held in this case that Michigan cannot constitutionally deny appellate counsel to such indigents, every indigent in the United States, including those in Michigan, currently enjoys the right to appellate counsel on his or her first appeal from a felony conviction. As a result of the Sixth Circuit's decision, the law in this area is once again uniform throughout the United States.

From the time *Douglas v. California*, 372 U.S. 353 (1963), was decided until the passage of the Michigan statute at issue in this litigation, no American jurisdiction had even attempted to deny the appointment of appellate counsel to indigents filing their first direct appeals from felony convictions and sentences because such an attempt would

obviously violate *Douglas* and its progeny. Every case from every jurisdiction to consider the issue had concluded that *Douglas* guarantees an indigent defendant the assistance of appellate counsel for a first appeal, whether that first appeal is denominated as an "automatic" appeal or an appeal "by leave." *See, e.g., Bundy v. Wilson*, 815 F.2d 125, 130 (1st Cir. 1987) (concluding that *Douglas* governs first-tier appeal by leave to the New Hampshire Supreme Court); *Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-914 (Va. 1965) (*Douglas* guarantees right to counsel for first-tier appeal by leave to Virginia Court of Appeals); *Mata v. Egeler*, 383 F.Supp. 1091, 1092-1094 (E.D. Mich. 1974) (*Douglas* guarantees appointment of counsel for indigent pursuing first-tier delayed appeal by leave of court). Until *Bulger*, no court had ever held that the protections of *Douglas* were inapplicable to indigents who pleaded guilty or nolo contendere. *Cf. State v. Trowell*, 739 So.2d 77, 80-81 (Fla. 1999); *Perez v. State*, 4 S.W.2d 305, 307 (Tex. Ct. App. 1999).

According to Petitioners, however, Michigan may constitutionally deny the appointment of appellate counsel to indigents filing applications for leave to appeal to the Michigan Court of Appeals because such an appeal is a "discretionary" appeal within the meaning of *Ross v. Moffitt*, 417 U.S. 600 (1974). Petitioners' argument seriously misreads *Ross,* which held only that the Fourteenth Amendment does not require the appointment of appellate counsel for a purely discretionary appeal to a state supreme court *after* the indigent had already been provided counsel for an initial appeal to an intermediate appellate court. *Id.* at 614-616. The Court stressed in *Ross* that both the fact that counsel had been provided for an initial appeal and the fact that the second-tier appeal was discretionary were vital to the result. The rationale of *Ross*, that the defendant who has already had appellate counsel through one appeal does not

need counsel to help him file a petition for second-tier discretionary review, completely collapses when applied to a *first-tier* appeal regardless of whether the state calls that first appeal "automatic" or "by leave."

The Michigan Supreme Court's decision in *Bulger,* like the Petitioners' argument in this Court, completely ignores the Court's post-*Ross* cases, all of which clearly indicate that *Douglas*, not *Ross*, applies to the underlying issue in this litigation. The Court has repeatedly explained that the holding in *Ross* was limited to discretionary second-tier appeals. *See United States v. MacCollom*, 426 U.S. 317, 324 (1976) (plurality); *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (explaining *Douglas* guaranteed counsel for "initial appeal," while *Ross* declined to extend "to a discretionary appeal . . . from the intermediate appellate court to the Supreme Court of North Carolina"); *Coleman v. Thompson*, 501 U.S. 722, 756 (1991) (*Ross* "declined to extend the right to counsel beyond the first appeal of a criminal conviction"), *see also id.* at 742 (approvingly citing and discussing Virginia Supreme Court's holding that *Douglas* required appointment of counsel for first appeal by leave of court); *Smith v. Robbins*, 528 U.S. 259, 279 & n. 10 (2000) (concluding that *Douglas* and *Ellis v. United States*, 356 U.S. 674 (1958), require that indigent receive appellate counsel "in all cases" to evaluate case for possible appellate arguments).

In particular, Petitioners ignore the Court's crystal-clear explanation of the difference between *Douglas* and *Ross* in *Evitts v. Lucey*, 469 U.S. 387, 402 (1985), in which the Court held that *Ross* could not be applied to any first appeal on the merits because such an appellant "has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion," and "has not

previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process."

It follows immediately from *Douglas*, *Ross*, *Evitts*, and the other post-*Ross* cases that the appeal at issue in this litigation is an appeal within the meaning of *Douglas* and *Evitts* for which counsel must be provided. A Michigan defendant who pleads guilty or nolo contendere has a right to challenge his or her sentence and conviction by filing an application to the Michigan Court of Appeals. That application is a *first appeal* because the defendant does not already have "a brief on the merits of the appeal, or a previous written opinion" and "has not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Evitts*, 469 U.S. at 402. As discussed below in Part A of this argument, the Michigan Court of Appeals, unlike the North Carolina Supreme Court at issue in *Ross*, decides the *merits* of an application for leave to appeal. Since an indigent's application for leave to appeal from a plea-based conviction and sentence will be his or her first and only appeal on the merits, "[i]t follows that for purposes of analysis under the Due Process Clause," that this appeal will be "an appeal as of right, thus triggering the right to counsel recognized in [*Douglas*]." *Evitts* at 402.

A. Contrary to Petitioners' claims, an application for leave to appeal to the Michigan Court of Appeals is not a "discretionary appeal."

Despite the clear language in *Evitts* defining a "discretionary appeal" within the meaning of *Ross* as a second-tier appeal that an appellate court is free to reject on grounds other than the merits, Petitioners persist in repeatedly labeling a first-tier application for leave to appeal to the

Michigan Court of Appeals as "discretionary" without ever analyzing that term and without discussing or even citing *Evitts*. *See, e.g.*, Petition for Certiorari at i (using the term "discretionary" three times in Questions Presented to describe the appeal at issue in this litigation)

As Petitioners acknowledged below, the Michigan Court of Appeals standard order denying a properly-filed application for leave to appeal states that "The Court orders that the application for leave to appeal is DENIED *for lack of merit in the grounds presented*." Defendants' Brief in Response to Petition for Rehearing at 9 (emphasis added); *see also* (R. 2: Motion for Preliminary Injunction, Exhibit B). The Michigan Court of Appeals has itself held many times that an order denying leave to appeal for "lack of merit" in the grounds presented *is* a conclusive determination of the merits of the case, thus precluding further review under the law of the case doctrine. In *People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984), for example, the Michigan Court of Appeals explained, "In an order dated February 1, 1983, another panel of this Court denied defendant's motion to remand on this same issue 'for lack of merit in the grounds presented.' Therefore, we are precluded from reaching the merits of this issue by the law of the case doctrine." *See also People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983) (same); *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981) (same).

Similarly, the federal courts treat a Michigan Court of Appeals order denying leave to appeal "for lack of merits in the grounds presented" as a decision on the merits for purposes of habeas corpus review. *See, e.g., Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (summary order upholding conviction treated as decision on the merits for habeas review); *Myers v. Straub*, 159 F. Supp.2d 621, 626

(E.D. Mich. 2001) (applying *Harris* to form order denying Michigan plea defendant's application for "lack of merit in the grounds presented"); *Miller-Bey v. Stine*, 159 F.Supp.2d 657, 663, 667, 671 (E.D. Mich. 2001) (same); *Onifer v. Tyskiewicz*, 255 F.3d 313, 315-316 (6th Cir. 2001) (applying *Harris* where the Michigan Court of Appeals summarily denied criminal defendant's appeal for "lack of merit"); *King v. Trippett*, 192 F.3d 517, 521 (6th Cir. 1999) (observing that the district court held that the Michigan Court of Appeals' decision denying petitioner's application for "lack of merit" was reasonable application of federal law).

Even if a first direct application for leave to appeal to the Michigan Court of Appeals were truly "discretionary," *Douglas*, not *Ross*, would still apply because such an appeal is a first appeal. *See Bundy*, 815 F.2d at 830 (rejecting claim that *Ross* governs a first-tier discretionary appeal to the New Hampshire Supreme Court because provision of counsel on a first-tier appeal was "vital" to the result in *Ross*); *Evitts*, 469 U.S. at 402 (stressing that *Ross* applies where appellant has previously had assistance of appellate counsel on first appeal). It is clear, however, that a first application to the Michigan Court of Appeals is not a "discretionary" appeal in any sense of the word since it is both a first appeal and an appeal that the Michigan Court of Appeals actually decides on the merits.

B. *Douglas* fully applies to appeals following guilty and nolo contendere pleas.

Petitioners maintain that *Douglas* should not be read to apply to appeals after guilty or nolo contendere pleas because such pleas limit the number of potential appellate issues. The most obvious objections to this argument are that it finds absolutely no support in *Douglas* or in any of the Court's other cases and that it is affirmatively contradicted by the

Court's treatment of this issue in the context of guilty-plea cases.

The Court has consistently recognized that a typical indigent is completely incapable of identifying and raising any kind of issue in a first direct appeal without the assistance of counsel. As the Court put it in *Evitts*, "To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." 469 U.S. at 636. In *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000), the Court specifically recognized, *in an appeal from a guilty plea*, "It is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."

While a guilty or nolo plea unquestionably does limit the number of potential appellate issues, many potential appellate issues of all levels of complexity remain. Michigan defendants have the right to challenge, after pleading guilty or nolo contendere, dozens of different types of sentencing errors, including Double Jeopardy Clause violations, improper imposition of consecutive sentences, excessive restitution orders, erroneous denials of credit for prior incarceration, breaches of plea bargains at sentencing, denials of allocution, and violations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In 1999, the Michigan Legislature enacted a sentencing guideline scheme that rivals its federal counterpart in complexity. *See* Mich. Comp. Laws § 777.1, *et seq.* Yet the

statute at issue in this litigation provides that a trial judge "may," but does not have to, appoint appellate counsel for an indigent who has preserved an outcome-determinative challenge to the judge's own scoring of the sentencing guidelines. In other words, the statute would require many or most indigents to litigate complex sentencing guidelines questions, many of which would be questions of first impression in Michigan, without the assistance of appellate counsel.

As the Court has recognized, *see Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant will be completely incapable of even identifying his or her meritorious appellate issues. Nor will he or she be capable of navigating the minefield of appellate procedure in order to file a coherent application for leave to appeal raising the issue. *See Evitts*, 469 U.S. at 636; *see also Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000) (recognizing that even if counsel is ineffective, "it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself").

Petitioners' argument that an indigent should be able to make do with trial counsel's work product is both disingenuous and directly contrary to *Douglas* and *Evitts*. In almost all cases, *there is no written work product of trial counsel for the indigent to use*. The overwhelming majority of plea appeals in Michigan, as in other jurisdictions, involve issues that arise at the sentencing hearing. There is absolutely no requirement in Michigan law that trial counsel's objections to guidelines scoring, jail credit, consecutive sentencing, consideration of prior convictions, restitution orders or any other issue be in writing. Such objections, if trial counsel makes them at all, are almost invariably made orally at the sentencing hearing.

However, even if trial counsel has put something in writing, there is not the slightest suggestion in any of the Court's cases that trial counsel's work product is sufficient to dispense with the appointment of appellate counsel. Indeed, *Douglas* would make no sense if Petitioners' argument were correct because the appellants in *Douglas* presumably could have used their trial attorneys' work product. On the contrary, as *Ross* and *Evitts* make clear, appellate counsel need not be provided for a second-tier appeal only because the indigent has already received *appellate* counsel's work product. *Ross* at 614-615; *Evitts* at 402. Finally, as the Court specifically recognized in *Flores-Ortega*, an appeal arising from a guilty plea, appellate counsel is necessary to assist the indigent in identifying any potentially meritorious issues for appeal in the first place. 528 U.S. at 486.

Even in those rare cases where trial counsel has produced a work product that could help an indigent file an application for leave to appeal, an indigent left to his or her own devices has virtually no chance of successfully overcoming the *procedural* hurdles that stand in the way of having that appeal heard. The Court has specifically recognized that those procedural hurdles are "hopelessly forbidding" to any layperson filing a first appeal. *Evitts*, 469 U.S. at 636. The procedural difficulties an indigent faces in perfecting an appeal are precisely the same whether the appeal follows a conviction by trial or by plea. The Michigan Supreme Court has provided a very good example of this point in *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), where the court held that an indigent plea defendant who was forced to file an application for leave to appeal without the assistance of counsel forfeited his right to have his sentencing appeal heard by the Michigan Court of Appeals because he failed in his attempt to obtain his sentencing transcript.

In short, there is no support for Petitioners' argument that *Douglas* should be limited to appeals from trials, and no American jurisdiction had even attempted to impose such a limitation, much less uphold it, before Michigan launched the effort that led to this litigation.

C. The narrow exceptions contained in the statute do not render it constitutional.

Petitioners contend that the statute is constitutional because it does require the appointment of counsel in four circumstances: (1) to defend a prosecutor's appeal; (2) if the Michigan Court of Appeals grants the indigent's application for leave to appeal; (3) if the plea was conditional; or (4) if the sentence exceeded the guidelines range.

The first two exceptions, by definition, do not apply to the indigent defendant who needs the assistance of appellate counsel to file an application for leave to appeal to the Michigan Court of Appeals. The second exception simply means that if the indigent is somehow able to file an application for leave to appeal on his or her own that miraculously identifies and coherently argues a potential meritorious issue, the Michigan Court of Appeals will then provide counsel. In other words, the vast majority of indigents who cannot identify and raise their own issues in a meaningful way will never get to the point where the second exception could apply.

The third exception, for conditional pleas, is also completely useless to the vast majority of indigents who need the assistance of counsel for two reasons. First, *there is no right in Michigan to enter a conditional plea.* Michigan Court Rule 6.301(C) provides that "A defendant may enter the following pleas *only with the consent of the court and the*

prosecutor: (2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity." (Emphasis added). Since a defendant can only enter a conditional plea with the consent of both the judge and the prosecutor, conditional pleas are exceedingly rare in Michigan.

Second, a defendant can enter a conditional plea only to challenge *"pretrial rulings."* Mich. Ct. Rules 6.301(C)(2) (emphasis added). But the vast majority of appeals after guilty and nolo contendere pleas concern *sentencing* issues. In other words, the possibility of a conditional plea is of absolutely no use to a typical indigent plea defendant whose complaint arises not from a pretrial ruling but from the sentence he or she received after the plea has already been entered and accepted.

The statute's final exception is for defendants who receive an upward departure from the sentencing guidelines. While such defendants undoubtedly need the assistance of appellate counsel, the problem is that they are not the only ones who may have meritorious appellate issues. Indeed, as discussed above, indigents who receive sentences that would have been outside the guidelines range if the trial judge had scored the guidelines correctly are not guaranteed the assistance of appellate counsel even when the indigent has preserved his or her challenge to the trial judge's scoring.

For all other types of appellate issues, no matter how meritorious, the statute flatly forbids the judge from appointing appellate counsel. The vast majority of indigent defendants who wish to appeal from their sentences or pleas, therefore, receive only a "meaningless ritual," while moneyed defendants receive "a meaningful appeal." *See Douglas*, 372

U.S. at 358. The narrow exceptions in this statute cannot save it.

II. The Sixth Circuit and the district court properly concluded that the attorney plaintiffs have standing under the doctrine of *jus tertii*.

The second issue which Petitioners raise concerns the standing of two of the plaintiffs, Arthur M. Fitzgerald and Michael D. Vogler, to challenge the constitutionality of Mich. Comp. Laws §770.3a. The district court held that Mr. Fitzgerald and Mr. Vogler could challenge the act under the doctrine of *jus tertii*. (93a-100a). The Sixth Circuit panel decision affirmed the district court's ruling. (73a-77a). In its rehearing *en banc* the Sixth Circuit also reached the conclusion that third party standing was appropriate.

To understand the *jus tertii* claim being made by Mr. Fitzgerald and Mr. Vogler, it is important to understand the process by which appellate counsel are apportioned to represent indigent defendants in Michigan. In 1978, the Michigan Legislature established an Appellate Defendant Commission. Mich. Comp. Laws §780.712. One of the functions of that Commission was to compile and maintain a statewide roster of attorneys eligible and willing to accept assigned criminal appeals. Mich. Comp. Laws §780.712(b). Subsequently, by Administrative Order of the Michigan Supreme Court, the agency known as Michigan Assigned Appellate Counsel System (MAACS) was established to perform this function. Michigan Supreme Court Administrative Order 1981-7, 412 Mich. lxv (1981). MAACS maintains a statewide list of attorneys who are deemed qualified to accept assigned appeals. Administrative Order 1981-7, §2(1), 412 Mich. lxviii. After qualifying for the statewide list, the attorney selects the circuit courts he is

willing to take appeals from by placing his name on a local list. Michigan circuit court judges appointing appellate counsel to an indigent defendant must appoint from this roster of approved lawyers. Moreover, in appointing appellate counsel in a particular case, the local circuit court or its designated representative rotates through the local list. Administrative Order 1989-3(4), (5), 432 Mich. cxxii (1989).

Mr. Fitzgerald is on the roster of qualified attorneys able to take assigned criminal appeals from convictions in Michigan's 10th Circuit Court. (R. 1: Complaint, ¶ 33). Mr. Vogler is on the list of attorneys who will be assigned criminal appeals from Michigan's 26th Circuit Court. (*Id*, ¶ 34). Both earn a portion of their income by taking assigned appeals from trial and plea-based convictions (*Id*, ¶¶ 33, 34). Because of the way that the assigned counsel system operates in Michigan, Mich. Comp. Laws §770.3a will adversely affect the income of both Mr. Fitzgerald and Mr. Vogler because, "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." (*Id*, ¶ 36).

Under the doctrine of *jus tertii*, a plaintiff has standing to assert the constitutional rights of third parties if three requirements are met: (1) "the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute;" (2) "the litigant must have a close relationship to the third party;" and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Singleton v. Wulff*, 428 U.S. 106 (1976).

In the district court and again before the Sixth Circuit, Petitioners challenged only one of the three requirements for

jus tertii standing identified in *Powers*. They contended that Mr. Fitzgerald and Mr. Vogler could not establish *jus tertii* standing because they had not sustained an "injury on fact." Petitioners have substantially modified their position in this Court. They now contend that Mr. Fitzgerald and Mr. Vogler lack standing because they cannot satisfy any one of the three requirements set out in *Powers*. Petitioners are wrong on all three points.

Mr. Fitzgerald and Mr. Vogler have alleged that the reduction of appointed appellate assignments caused by Mich. Comp. Laws §770.3a will reduce the amount of income which they will earn through criminal appellate assignments. This allegation cannot be denied. The description of the Michigan assigned appellate system provided above demonstrates that the operation of this statute will necessarily result in a loss of income for both Mr. Fitzgerald and Mr. Vogler. Indeed, the Petitioners concede that Mr. Fitzgerald and Mr. Vogler will lose income as a result of the statute. They acknowledge in their Petition that, "the Attorneys' claim that the statute will adversely affect their incomes must be taken as true." Petition, p. 23.

Loss of income is the classic "injury in fact" supporting third party standing. In *Singleton, supra,* the Court held that physicians who would perform abortions had standing to assert the constitutional rights of their patients to challenge a statute denying Medicaid reimbursement for certain abortions. As the Court put it: "there is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute. . . . If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions." 428 U.S. at 112-113.

Similarly, in *Craig v. Boren*, 429 U.S. 190 (1974), the Court held that a female beer vendor had *jus tertii* standing to challenge a statute barring males under the age of twenty-one from purchasing beer. The Court ruled that the vendor had standing to assert the constitutional rights of her male customers even though the statute did not violate her own constitutional rights, because she suffered "a direct economic injury through the constriction of her buyers' market." *Id*. at 194. The vendor's loss of income, therefore, provided the basis for third party standing in *Craig*. *Cf. Carey v. Population Services, International*, 431 U.S. 678, 683-684 (1977).

Petitioners also claim that Mr. Fitzgerald and Mr. Vogler do not possess a "close relationship" to the third party whose rights are involved. The third parties whose constitutional rights are involved herein are Mr. Fitzgerald's and Mr. Vogler's prospective indigent clients. This Court has held on at least two prior occasions that the lawyer/client relationship is sufficiently close to support third party standing. *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 623, n. 3 (1989); *United States Department of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990).

The Court's decision in *Triplett* also disposes of another argument which Petitioners offer. They contend that because the clients whose rights Mr. Fitzgerald and Mr. Vogler would assert are their *prospective* clients, no "close relationship" exists. However, in *Triplett*, this Court specifically recognized an attorney's standing to challenge a limitation on the fees which a lawyer could charge where that limitation "deprives the lawyer's *prospective* client of a due process right to obtain legal representation . . ." 494 U.S. at 720 (emphasis added).

The final requirement for *jus tertii* standing is that the third party's ability to assert his own interest must in some way be hindered. As the Sixth Circuit properly noted in its *en banc* decision, this Court's precedents do not require proof that it would be impossible for the third party to protect his own interest. (App. 12a-13a). All that is required is some impediment that affects the "likelihood and ability of the third parties . . . to assert their own interests." *Powers*, 499 U.S. at 414.

In this case, the likelihood and ability of Mr. Fitzgerald's and Mr. Vogler's prospective clients to assert their own rights is directly tied to the right which they would be denied under Mich. Comp. Law §770.3a. If the indigent defendants whom the two Respondents would represent are to vindicate their interests in the Michigan appellate system, they must do so without the benefit of counsel. These indigent defendants would be compelled to navigate on their own the "hopelessly forbidding" procedural rules governing appeals. *Evitts*, 469 U.S. at 636. Moreover, they would be required to develop the complex legal arguments supporting their claim without the assistance of an attorney. Under these circumstances, there exists a clear impediment to the third parties' ability to protect their own interests.

This case fits squarely within the description of third party standing discussed by the Court in *Triplett*. In that case the Court held that an attorney had the right to assert the constitutional interests of a client in the following circumstances:

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which

> relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist. *See Secretary of State of Maryland v. Joseph H. Munson Co*, 467 U.S. 947, 954, 958, (1984).

494 U.S. at 720. Here, an unconstitutional restriction prevents Mr. Fitzgerald and Mr. Vogler from entering into a relationship with third parties, despite the fact that these third parties have a constitutional entitlement to that attorney-client relationship. Under the Court's decision in *Triplett*, third party standing is appropriate here.

The Sixth Circuit's resolution of the third party standing issue presented in this case is fully consistent with the precedents of this Court. Furthermore, the Petitioners have not suggested that the Sixth Circuit's ruling on this point is inconsistent with a decision rendered by another federal appeals court.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

Mark Granzotto
Counsel of Record
414 West Fifth Street
Royal Oak, Michigan 48067
(248) 546-4649

David A. Moran
Wayne State University Law School
471 W. Palmer street
Detroit, Michigan 48202
(313) 577-4829

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